

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

ORIGINAL

~~75-5862~~ 76-7281

**United States Court of Appeals
For the Second Circuit**

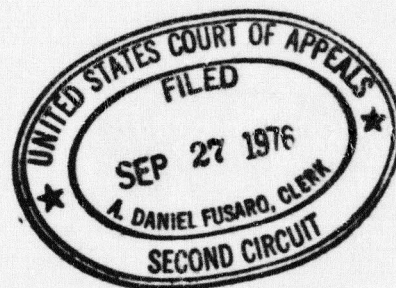
PRESCRIPTION PLAN SERVICE CORPORATION,
Plaintiff-Appellant,

-against-

**ALBERT FRANCO, individually and as Administrator,
SHANNON J. WALL, MARTIN F. HICKEY, MEL BARISIC,
F.K. RILEY, Jr., RICK MILLER, E. MARCUS, JAMES J.
MARTIN, W.I. RISTINE, PETER BOCKER, E.G. DENYS,
ANDREW RICH and KENNETH W. GUNDLING, individually
and as Trustees of the NMU PENSION & WELFARE PLAN,**
Defendants-Appellees.

*On Appeal From the United States District
Court For The Southern District of New York*

JOINT APPENDIX



MILTON HOROWITZ
Attorney for Plaintiff-Appellant
15 Park Row
New York, N.Y. 10038
(212) CO 7-0606

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendants-Appellees
Franco, Hickey, Riley, Marcus,
Ristine, Denys and Gundling
300 Park Avenue
New York, N.Y. 10022
(212) 593-9000

**ABRAHAM E. FREEDMAN
PHILLIPS & CAPPIELLO**
Attorneys for Defendants-Appellees
Wall, Barisic, Miller, Martin,
Bocker and Rich
346 West 17th Street
New York, N.Y. 10011
(212) 929-8410

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES

- 10-23-75 - Filed complaint and issued summons.
- 11-05-75 - Filed summons with marshals return served--Albert Franco by Ned Phillips on 10-29-75.
- 11-20-75 Filed stip. and order ext. defts time to answer to the complaint to 12-18-75--Stewart, J.
- 12-29-75 Filed defendants Franco, et.al's affdvt. and notice of motion to dismiss under Rule 12(b)(1) for lack of jurisdiction.-ret. 1-8-76
- 12-29-75 Filed memorandum of defendants Franco, Hickey, Riley, Marcus, Ristine, Denys and Gundling in support of their motion to dismiss.
- 12-29-75 Filed by defendants Wall, Barisic, Miller, Martin, Bocker and Rich -- affdvt. and notice of motion to dismiss for lack of jurisdiction -- ret. 1-8-76.
- 12-29-75 Filed defts Wall et.al's memorandum in support of motion to dismiss.
- 12-23-75 Filed stip. and order ext. defendants' time to answer to 12-24-75. -- Stewart, J.
- 1-07-76 Filed stip. and order adj. ret. date of defts motion to 2-5-76 and pltf. may serve opposition papers to counsel to and include 1-29-76. -- Stewart, J.
- 1-29-76 Filed pltf. affirmation and notice of cross motion to amend caption ret. 2-5-76.

- 1-29-76 Filed pltf. memorandum of law in opposition to
defts motion to dismiss the complaint.
- 2-06-76 Filed stip. and order adj. ret. date defts
motion and pltf's motion to 2-15-76 -- Gagliardi, J.
- 2-11-76 Filed defts. Wall. et al affdvt. in opposition
to defts motion to dismiss.
- 2-13-76 Filed reply memorandum of defts Franco, Hickey
et al. in support of motion to dismiss.
- 2-13-76 Filed defts Denys. affdvt. denying being served
with a copy of summons and complaint.
- 5-26-76 Filed notice of reassignment to Judge Goettel.
- 6-16-76 Filed OPINION No. 44573 -- The motion to dismiss
must be granted. So ordered, Goettel, J. m/n
- 6-17-76 Filed plaintiffs notice of appeal to the USCA
for the 2nd Circuit from order dismissing
complaint and denying pltf's cross motion to amend
caption of action by dropping defts Albert
Franco, Mel Barisic and Rick Miller as parties.
-- copies mailed.
- 6-23-76 Filed JUDGMENT--Ordered that all defendants have
judgment against pltf. dismissing action.
Clerk m/n

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
PRESCRIPTION PLAN SERVICE CORPORATION,

Plaintiff, : 75 Civil 5262 CES

- against - :

ALBERT FRANCO, individually and as :
Administrator, SHANNON J. WALL, MARTIN :
F. HICKEY, MEL BARISIC, F.K. RILEY, Jr., :
RICK MILLER, E. MARCUS, JAMES J. MARTIN, :
W.I. RISTINE, PETER BOCKER, E.G. DENYS, :
ANDREW RICH and KENNETH W. GUNDLING, :
individually and as Trustees of the :
NMU PENSION & WELFARE PLAN, :

C O M P L A I N T

Plaintiff demands trial
by a jury of all issues
of fact herein.

Defendants. :

----- X

Plaintiff by MILTON HOROWITZ, its attorney, complains of
the defendants and alleges:

FIRST: At all times herein mentioned plaintiff was and
still is a corporation organized and existing under the laws of the
State of New York, maintaining its offices in the County, City and
State of New York within the territorial jurisdiction of this Court.

SECOND: At all times herein mentioned the NMU PENSION
& WELFARE PLAN was and still is a trustee plan or fund, created by
indenture of trust to which the National Maritime Union, AFL-CIO, its
contracted employers, and the originating trustees were parties, and
governed as to organization, purposes and activities by section 302(c)(5)
of the Labor-Management Relations Act of 1947, as amended; 29 U.S.C.
§ 186(c)(5)(A) and (B).

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THIRD: This action arises and the jurisdiction of this Court is invoked:

a) Under 28 U.S.C. § 1331 as arising under the laws of the United States inclusive of section 302(e) of the Labor-Management Relations Act of 1947, as amended; 29 U.S.C. § 186(e); the Welfare and Pension Plan Disclosure Act of 1958, 29 U.S.C. § 301 et seq. , and other pertinent federal statutes; as well as

b) Under 28 U.S.C. § 1332 for diversity of citizenship between the New York plaintiff and the defendants, who do not reside in the State of New York.

FOURTH: The amount in controversy herein exceeds the sum of \$10,000.00.

FOR A FIRST CAUSE OF ACTION HEREIN

FIFTH: From and prior to December 1972, and continuing to the present day, defendant trustees and administrator, their predecessors and others, conspired, planned, schemed and agreed amongst themselves to divert substantial sums of money from the legitimate, statutory trust purposes and applications of the NMU Pension & Welfare Plan, and to apply the moneys thus diverted to unwarranted purposes and expenditures for the private benefit of the National Maritime Union and its political administration, for the financing of said Union's activities, to meeting the patronage requirements of said Union administration for a paid staff far out of proportion to the actual administrative requirements of the NMU Pension & Welfare Plan, and to the utilization of such Plan paid staff and Plan purchased clerical electronic equipment for the Union's own purposes.

SIXTH: In furtherance and implementation of the aforesaid scheme and conspiracy, the defendants, while promoting certain programs having the appearance of fulfilling beneficial purposes of the Plan, took measures and attached conditions such as would assure gross under-utilization and virtual nullification of the benefit. More particularly, in promoting a pharmaceutical prescription payment plan, defendants, by deliberately poor publicity, by adroitly discouraging quantity, identification and outlet requirements, and, above all, by its requirement that the eligible beneficiary directly pay to the dispensing pharmacist the first \$2.00 of cost of each prescription item, virtually eliminated utilization of the benefit.

SEVENTH: In order to induce plaintiff to enter into service contractual arrangements for administering the pharmaceutical prescription benefit, arrangements which defendants then knew would, with the restrictions on benefit payments aforesaid, be a loss item to plaintiff, then also well knowing of their intention for self-administering prescriptions once they acquired a million dollar computerized equipment setup and a topheavy paid staff to administer a computerized program, defendants, in and about November and December, 1972, and continuing thereafter, did make the following representations to plaintiff:

a) If plaintiff would make sacrifices during the initial year or two in which the prescription benefit was to be launched, plaintiff would be rewarded with a bona fide opportunity to continue the relationship indefinitely thereafter on an equitable, mutually beneficial basis.

b) During the aforesaid initial period, the prescription payment program would be actively promoted and campaigned for amongst the Union membership and their families through the Union publicity facilities.

c) That the Union had a beneficiary nucleus base of approximately 14,000 retired members and 11,000 active members, upon which could be anticipated a volume of hundreds of thousands of serviced prescriptions.

EIGHTH: The aforesaid representations to plaintiff were false and known to defendants to be false in that defendants knew and intended a) that the Plan would go on prescription payment self-administration as soon as the moneys diverted from benefit payments would be sufficient to purchase the equipment and hire the clerical staff; b) that the use of the prescription benefit payment would be discouraged through onerous conditions, rather than promoted and encouraged; and c) that the membership figures were deliberately grossly overstated for multiple fraudulent purposes.

NINTH: The aforesaid false and fraudulent representations were made by defendants to plaintiff with the intention of inducing plaintiff to rely thereon which plaintiff did to its great damage, all as more fully set forth hereinbelow.

TENTH: On or about December 22, 1972, on the strength of the representations aforesaid, defendants and plaintiff entered into an agreement for plaintiff's prescription plan administration services

covering the one year period from March 1, 1973. Said agreement allowed plaintiff but 38¢ per prescription serviced and a minimal fixed amount to cover contracted mailings to beneficiary principals. Contrary to plaintiff's urgings, the \$2.00 self-payment restriction was incorporated into the agreement.

ELEVENTH: Upon plaintiff's complaints of heavy losses under said contract of December 22, 1972. the parties herein entered into a new contract dated January 29, 1974 which ran for one year from January 1, 1974. Said agreement raised the per prescription service fee to 50¢. still grossly inadequate to compensate plaintiff for its services.

TWELFTH: Finally, at a time when defendants knew that their equipment purchases and staff additions would be complete within the next several months, the defendants entered into an agreement dated January 11th, 1975 for an indeterminate period of time terminable on sixty days written notice, which, while leaving the per prescription service fee unchanged, gave a minimum guarantee service fee to plaintiff of \$1.50 per enrolled eligible member per six month period of coverage. Based on the list submitted of 24,632 such members, the semi annual guarantee was therefore \$36,948.00, and the actual sum of \$6,158.00 was paid out each month during the first six months of 1975 by defendants to plaintiff.

THIRTEENTH: In the Spring of 1975 the defendants had, with funds illegally diverted as aforesaid, purchased electronic computer

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systems equipment for upwards of \$1,200.000. and hired many additional clerical and administrative personnel. In accordance with their aforesaid scheme, conspiracy and plan, the defendants wrongfully cancelled and terminated the agreement of January 11, 1975 as of June 30, 1975 and went on to self-administration of the prescription payment benefit as of July 1st, 1975 notwithstanding it was many times more costly to the trust. As of July 1st, 1975, the self-pay feature of the prescription benefit was reduced to \$1.00 per prescription from \$2.00.

FOURTEENTH: As a result of the illegal scheme and conspiracy of defendants aforesaid coupled with their fraud and deceit practiced upon the plaintiff as aforesaid, plaintiff has been damaged in the sum of \$250,000.00.

FOR A SECOND CAUSE OF ACTION HEREIN

FIFTEENTH: Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs numbered TWELFTH and THIRTEENTH hereof with the same force and effect as though set forth herein fully and at length.

SIXTEENTH: Said agreement of January 11th, 1975 expressly provided and provides that the obligations of the parties thereunder continue with respect to "claims incurred by prescriptions for eligible members during the term of this Agreement" and for prescription billings continued to be received by plaintiff from Plan eligible beneficiaries and participating druggists after termination.

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SEVENTEETH: Plaintiff has in every month since the termination of the agreement of January 11, 1975 received a considerable volume of prescriptions for servicing payment, central fill, etc., and can reasonably anticipate such continuation of defendants' prescription business through June of 1976.

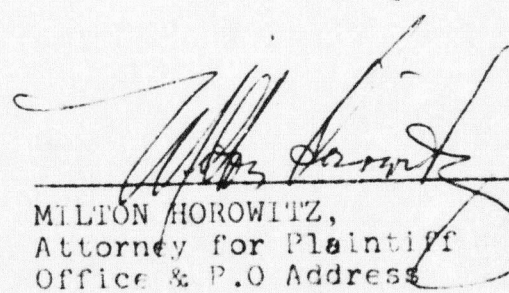
EIGHTEENTH: There is, and there will become, due for each and every month from July 1975 inclusive in which defendants' Plan prescriptions are and will be processed by plaintiff the sum of \$6,158.00. Plaintiff has made demand for such payment for the months of July, August and September 1975, and defendants have wrongfully disclaimed any liability whatsoever and have defaulted all such post termination payments.

NINETEENTH: Plaintiff has performed all conditions of said agreement of January 11, 1975 on its part to be performed.

TWENTIETH: By reason of the aforesaid breach of said contract by defendants, plaintiff has been damaged in the sum of \$73,896.00, no part of which has been paid although demanded.

WHEREFORE plaintiff demands judgment against defendants and each of them in the sum of \$323,896.00 with appropriate interest thereon and the costs of the action.

Dated: New York, N.Y.
October 21, 1975.



MILTON HOROWITZ,
Attorney for Plaintiff
Office & P.O. Address
15 Park Row
New York, N.Y. 10038
(212) CORTLANDT 7-0606

MARSHAL'S RETURN

U.S. MARSHALS SERVICE
PROCESS RECEIPT and RETURNINSTRUCTIONS: See "INSTRUCTION" OR SERVICE OF
PROCESS BY THE U.S. MARSHAL on the reverse of the last page.
(No. 5) copy of this form. Please type or print legibly, insuring
readability of all copies. Do not detach any copies.

PRESCRIPTION PLAN SERVICE CORPORATION

COURT NUMBER
75 Civil 5212 CESALBERT FRANCO individually and for Administration of NMU PENSION
+ WELFARE PLANTYPE OF WRIT(S)
SUMMONS + COMPULSORYNAME OF INDIVIDUAL, COMPANY, CORPORATION, ETC., TO SERVE OR DESCRIPTION OF PROPERTY TO SEIZE OR CONDEMN
ALBERT FRANCOADDRESS (Street or RFD, Apartment No., City, State and ZIP Code)
810 NMU PENSION + WELFARE PLAN
346 WEST 17TH ST., NEW YORK, N.Y. 10011

SEND NOTICE OF SERVICE COPY TO NAME AND ADDRESS BELOW

MILTON HOROWITZ, ESQ.
15 PARK ROW
NEW YORK, N.Y. 10038Number of writs to be
served with this form-285Number parties to be
served in this caseCheck for service
on U.S.A.

SPECIAL INSTRUCTIONS OR OTHER INFORMATION THAT WILL ASSIST IN EXPEDITING SERVICE:

Signature of Attorney or other Originator requesting service on behalf of

☒ PLAINTIFF
☐ DEFENDANTTELEPHONE NUMBER
COT-0606DATE
OCT. 23, 1975

SPACE BELOW FOR USE OF U.S. MARSHAL ONLY - DO NOT WRITE BELOW THIS LINE

I acknowledge receipt for the
total number of writs indicated
(Sign only first USM 285 if
more than one 285 is submitted)

Total Writs

1

District
of Origin

54

District
to Serve

54

Signature of Authorized USMS Deputy or Clerk

M. Clark

Date

10-23-75

I hereby certify and return that I ☒ have personally served, ☐ have legal evidence of service, ☐ have executed as shown in "Remarks", the
writ described on the individual, company, corporation, etc., at the address shown above or on the individual, company, corporation, etc., at
the address inserted below.☐ I hereby certify and return that I am unable to locate the individual, company, corporation, etc., named above. (See remarks below)

Name and title of individual served (if not shown above)

Fred J. Phillips Attorney

Address (State only if different than shown above)

☐ A person of suitable age and
discretion then residing in the
defendant's usual place of abode

Date of Service

10-29-75

am
pm

Signature of U.S. Marshal or Deputy

F. J. Phillips

Forwarding Fee

Service Fee

3.00

Mileage (including endeavors)

.60

Total

3.60

REMARKS

1 CLERK OF THE COURT

MOTION OF DEFENDANTS FRANCO, HICKEY, RILEY, MARCUS, RISTINE,
DENYS AND GUNDLING FOR DISMISSAL ON JURISDICTIONAL GROUNDS
NOTICE OF MOTION OF DECEMBER 24, 1975
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

PRESCRIPTION PLAN SERVICE CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	75 Civ. 5262 (CES)
ALBERT FRANCO, individually, and as	:	
Administrator, SHANNON J. WALL, MARTIN	:	
F. HICKEY, MEL BARISIC, F. K. RILEY,	:	
JR., RICK MILLER, E. MARCUS, JAMES J.	:	<u>NOTICE OF MOTION</u>
MARTIN, W. I. RISTINE, PETER BOCKER,	:	
E. G. DENYS, ANDREW RICH and KENNETH	:	
W. GUNDLING, individually and as	:	
Trustees of the NMU PENSION & WELFARE	:	
PLAN,	:	
	:	
Defendants.	:	

-----x

S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavits of Albert Franco, Martin F. Hickey, Mel Barisic, F. K. Riley, Jr., Rick Miller, E. Marcus, W. I. Ristine, Kenneth W. Gundling and Ned Phillips, Esq.; the annexed Memorandum of Law in Support of Defendants' Motion to Dismiss; and the summons and complaint herein, defendants Albert Franco, Martin F. Hickey, F. K. Riley, Jr., E. Marcus, W. I. Ristine, E. G. Denys, and Kenneth W. Gundling will move this Court before Honorable Charles E. Stewart, at the United States

Courthouse, Room 501, Foley Square, New York, New York on the 8th day of January, 1976 at 10 o'clock in the forenoon of that day, or as soon thereafter as counsel may be heard, for an order, pursuant to Rule 12(b)(1), (2) and (5) of the Federal Rules of Civil Procedure, dismissing the complaint herein on the grounds that the Court lacks jurisdiction over the subject matter of the claims set forth in the complaint; the Court

lacks jurisdiction over the person of defendants Marcus and Denys; the Court lacks jurisdiction over the person of defendants Hickey, Riley, Ristine and Gundling in their individual capacities; service of process was insufficient to confer upon the Court jurisdiction over defendants Marcus and Denys; and service of process was insufficient to confer upon the Court jurisdiction over defendants Franco, Hickey, Riley, Ristine and Gundling in their individual capacities.

Dated: New York, New York
December 24, 1975

Yours, etc.

PROSKAUER ROSE GOETZ & MENDELSON
Attorneys for Defendants ALBERT
FRANCO, MARTIN F. HICKEY, F. K.
RILEY, JR., E. MARCUS, W. I. RISTINE,
E. G. DENYS and KENNETH W. GUNDLING
300 Park Avenue
New York, New York 10022
(212) 593-9000

George G. Hallantz By *George G. Hallantz*
A member of the Firm

TO: MILTON HOROWITZ, ESQ.
Attorney for Plaintiff
15 Park Row
New York, New York 10038

ABRAHAM E. FREEDMAN, ESQ.
Attorney for Defendants
WALL, BARISIC, MILLER,
MARTIN, BOCKER and RICH
346 West 17th Street
New York, New York 10011

AFFIDAVIT OF ALBERT FRANCO OF DECEMBER 23, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

-against- :

75 Civ. 5262 (CES)

ALBERT FRANCO, individually and as :

Administrator, SHANNON J. WALL, :

MARTIN F. HICKEY, MEL BARISIC, :

F.K. RILEY, JR., RICK MILLER, :

E. MARCUS, JAMES J. MARTIN, :

W.I. RISTINE, PETER BOCKER, :

E.G. DENYS, ANDREW RICH and :

KENNETH W. GUNDLING, individually :

and as Trustees of the NMU PENSION & :

WELFARE PLAN, :

Defendants. :

-----x

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

ALBERT FRANCO, being duly sworn, deposes and says:

1. I have since January 1, 1973 held the title of Administrator of the NMU Pension and Welfare Plan (the "Plan"). From 1968 until December 31, 1972, I held the title of Administrative Director of the Plan, serving under the Executive Director of the Plan. I make this affidavit in support of defendants' motion for an order dismissing

the complaint on the grounds that: the Court lacks subject matter jurisdiction over the claims set forth in the complaint; the Court lacks personal jurisdiction over defendants Marcus and Denys; the Court lacks personal jurisdiction over defendants Hickey, Riley, Ristine and Gundling in their individual capacities; service of process was insufficient to confer upon this Court jurisdiction over defendants Marcus and Denys; and service of process was insufficient to confer upon this Court jurisdiction over defendants Franco, Hickey, Riley, Ristine and Gundling in their individual capacities.

2. The Plan is a pension and welfare fund, established in accordance with Section 302(c) of the Labor-Management Relations Act of 1947, 29 U.S.C. §186(c), jointly administered by six representatives of the National Maritime Union ("Union") and six representatives of employers of Union members. The Plan was established by Agreement and Declaration of Trust, dated August 1, 1950, which provided, in substance and among other things, that the Agreement and Declaration of Trust was to be interpreted and governed in accordance with the laws of the State of New York and that the place of business of the Plan was to be New York,

New York. (At the present time, the Plan's offices are located at 346 West 17th Street, New York, New York.)

3. Plaintiff has sued ten of the twelve current trustees of the Plan, two former trustees of the Plan (defendants Marcus and Denys terminated their service as trustees as of October 1, 1974 and May 1, 1975, respectively) and the Administrator of the Plan, both individually and in their respective capacities as trustees and Administrator. Plaintiff alleges that defendants fraudulently induced plaintiff to enter into contractual relations whereby plaintiff was to administer and service a pharmaceutical prescription benefit program for the benefit of all eligible beneficiaries of the Plan and that defendants breached the last of three such agreements. The relief sought by plaintiff is money damages in the total amount of \$323,896. A copy of the complaint is annexed hereto as Exhibit A.

4. As more fully demonstrated below, as well as in the accompanying memorandum of law, it is clear that: plaintiff has failed to state a claim cognizable under any federal statute; complete diversity of citizenship does not exist between plaintiff and defendants since plaintiff, three of the named defendants and the Plan itself are all citizens of New York State; plaintiff has failed to demonstrate a

basis under which the Court may exercise personal jurisdiction over defendants Marcus and Denys, since they are no longer trustees of the Plan and are not residents or domiciliaries of New York State; plaintiff has failed to demonstrate a basis under which the Court may exercise personal jurisdiction over defendants Hickey, Riley, Ristine and Gundling in their individual capacities, since they are not residents or domiciliaries of New York State; and plaintiff has failed to effect service of process over defendants Marcus and Denys, or over defendants Franco, Hickey, Riley, Ristine and Gundling in their individual capacities, since none of them were properly served with copies of the summons and complaint.

The Nature of the Contracts at Issue

5. In or about 1970, the Plan began to investigate the feasibility of providing for its beneficiaries a pharmaceutical prescription benefit program which would enable them to obtain prescription drugs upon payment of a small "deductible" fee. Upon learning of the Plan's interest in setting up such a program, plaintiff presented it with a proposal for administering and servicing such a program. After engaging in negotiations, plaintiff and the Plan entered into an agreement dated December 22, 1972, pursuant

to which plaintiff was to administer and service a pharmaceutical prescription benefit program for the benefit of the Plan's beneficiaries. A copy of this agreement is annexed hereto as Exhibit B.

6. The aforesaid agreement provided, in substance and among other things, that plaintiff was to receive an annual enrollment fee of 50 cents per eligible member to cover the cost of mailings and related charges (§7), a service fee of 38 cents for each claim processed or rejected during the period of the agreement (§6), and reimbursement for the specified permissible costs incurred for direct payments to participants and participating pharmacies (§§5 and 6). By its terms, the agreement was to remain in effect for one year from March 1, 1973 and was to be automatically extended beyond the first anniversary date, although either party had the right to terminate the agreement after the first anniversary date on 60 days' written notice (§13).

7. On or about January 29, 1974, plaintiff and the Plan terminated the first agreement and entered into a second agreement on substantially similar terms as the first agreement except that, under the second agreement, plaintiff was to receive a service fee of 50 cents (instead of 38 cents)

for each claim processed or rejected during the period of the agreement (§6). By its terms, the second agreement was to remain in effect for one year from January 1, 1974 and was to be automatically extended beyond the first anniversary date, although either party had the right to terminate the agreement after the first anniversary date on 60 days' written notice (§13). A copy of the January 29, 1974 agreement is annexed hereto as Exhibit C.

8. By agreement dated January 11, 1975, plaintiff and the Plan extended the second agreement for a period of six months, from January 1, 1975 through June 30, 1975, subject to certain changes more particularly set forth therein. Among these changes were the following: (a) plaintiff was to receive a semi-annual enrollment fee of 25 cents per eligible member to cover the costs of mailings and other related charges (§3); (b) plaintiff was to receive a guaranteed minimum service fee for processing or rejecting claims (\$1.50 x number of eligible participants on January 1, 1975, which equalled \$36,948) if the service fees otherwise payable by the Plan for individual claims and rejections actually processed (i.e., 50 cents per claim or rejection) did not total a greater sum during the period of the agreement

(¶2); (c) the agreement would automatically expire on June 30, 1975 unless the Plan gave plaintiff 60 days' written notice that it wished to renew the agreement (¶4); (d) either party to the agreement had the right to terminate the agreement at any time upon 60 days' written notice to the other party (¶5); and (e) in the event that plaintiff continued to receive prescription billings from participants or participating druggists after termination of the agreement, plaintiff would receive service fees for processing prescriptions filled after termination of the agreement at the rate of \$1.00 per prescription (¶5). A copy of the January 11, 1975 agreement is annexed hereto as Exhibit D.

9. At no time did the Plan give plaintiff any notice that it wished to renew the agreement dated January 11, 1975. In fact, having found that plaintiff's performance had been generally unsatisfactory and had become progressively worse during the period of the three agreements, the Plan decided to terminate its contractual relations with plaintiff. Accordingly, in or about April, 1975, the Plan gave plaintiff written notice that as of June 30, 1975 it wished to terminate the agreement then in effect between plaintiff and the Plan. Since July 1, 1975, the prescription drug program has been self-administered by the Plan on a much more efficient basis than it had been by plaintiff.

The Nature of Plaintiff's Claims

10. Plaintiff now claims -- nearly three years after its execution of the first agreement -- that defendants fraudulently induced it to enter into contractual relations with the Plan. The misrepresentations allegedly made by defendants were: (a) that plaintiff would be given a bona fide opportunity to continue contractual relations with the Plan indefinitely; (b) that the prescription benefit program would be actively promoted among the Union membership; and (c) that the Union had approximately 11,000 active members and 14,000 retired members (Complaint, paragraph SEVENTH). Although plaintiff does not identify which of the named defendants made these alleged misrepresentations, plaintiff makes the bald, unsupported and inherently incredible assertion that these alleged misrepresentations were part of a "scheme" by defendants to insure that the prescription drug program would be unsuccessful (Complaint, paragraph SIXTH) and that defendants culminated this "scheme" by "wrongfully" terminating the January 11, 1975 agreement (Complaint, paragraph THIRTEENTH).

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11. In fact, the Plan gave plaintiff every reasonable opportunity to continue administering the prescription drug program, but plaintiff's unsatisfactory performance finally necessitated a termination of contractual relations pursuant to the terms of the applicable agreement. Moreover, the Plan desired to see the drug program succeed and, to that end, it actively promoted the drug program among the Union membership. Finally, plaintiff's apparent claim that defendants misrepresented the number of beneficiaries under the Plan is belied by plaintiff's own allegation that the Plan in fact had 24,632 eligible members (Complaint, paragraph TWELFTH).

12. Plaintiff's second cause of action is based upon an alleged breach by defendants of the January 11, 1975 agreement. Plaintiff claims that it was entitled to receive one-sixth of the minimum service fee provided therein ($\$1.50 \times 24,632 \text{ members} = \$36,948$ for the six month period of the agreement) for any month after the termination of the agreement in which it continued to process prescriptions for Plan members. However, the plain language of the agreement provided that the minimum service fee guarantee was applicable only to the six month period during which the agreement was in effect. After the termination of the agreement, plaintiff was to

receive a flat service fee of \$1 for each prescription filled after termination which it processed. Under plaintiff's interpretation of the agreement, the Plan would be obligated to pay plaintiff a service fee of \$6,158 per month even if plaintiff processed only one filled prescription in any month after the termination of the agreement. The mere statement of plaintiff's position demonstrates its absurdity.

The Court Lacks Jurisdiction Over the
Subject Matter of Plaintiff's Claims

13. . Plaintiff alleges that its claims arise under Section 302(e) of the Labor-Management Relations Act of 1947 ("LMRA"), 29 U.S.C. §186(e), and the Welfare and Pension Plan Disclosure Act of 1958 ("Disclosure Act"), 29 U.S.C. §301 et seq. (Complaint, paragraph THIRD). However, I am advised by counsel that the conduct proscribed by Section 302 of the LMRA is improper payments by employers to union representatives and improper demands for such payments by such representatives, that only union members may bring an action for violation of Section 302 of the LMRA and that the relief obtainable thereunder is limited to injunctive relief. I am further advised by counsel that the purpose of the Disclosure Act is to require disclosure with respect

to the operation and administration of employee welfare and pension benefit plans, that only participants or beneficiaries of such plans (or the Secretary of Labor) may bring an action for violation of the Disclosure Act and that the relief obtainable thereunder is limited to injunctive relief and to damages in the amount of \$50 per day from the date the administrator of such a plan improperly refused to disclose information which it is required to disclose under the Disclosure Act.

14. Since plaintiff does not allege that there were any improper payments from employers to Union representatives or that such representatives improperly demanded such payments or that the administrator of the Plan has failed to make the required disclosure with respect to its operation and administration, and since plaintiff is not and has never been a Union member or a participant or beneficiary of the Plan, and since the relief sought by plaintiff is limited to money damages for fraudulent inducement to enter into contractual relations and for breach of contract, it would appear that plaintiff has no basis whatsoever for reliance upon the aforementioned federal statutes other than its desire to bring this case in Federal Court.

15. Plaintiff also asserts that this Court has jurisdiction over its claims because diversity of citizenship exists between "the New York plaintiff and the defendants, who do not reside in the State of New York." (Complaint, paragraph THIRD). I am a citizen of the State of New York, residing at 46 Favorite Lane, Jericho, New York, and the affidavits of defendants Mel Barisic and Rick S. Miller (which are annexed hereto as Exhibits E and F, respectively) show that they too are citizens of the State of New York. In addition, the Plan itself is a New York based pension and welfare fund (see ¶2 hereof). I am advised by counsel that diversity of citizenship cannot provide the basis for federal jurisdiction unless there is complete diversity between all plaintiffs and all defendants. Since plaintiff alleges that it is a New York corporation and since three of the defendants, as well as the Plan itself, are citizens of New York, it is clear that complete diversity of citizenship does not exist between the parties to this action.

The Court Lacks Personal
Jurisdiction Over Defendants

16. I am advised by counsel that a plaintiff is required to demonstrate a basis for a Court's exercise of

jurisdiction over the person of a defendant in each capacity in which a defendant is sued, and that, even if such a basis exists, personal jurisdiction may not be exercised unless a defendant is properly served with a copy of the summons and complaint. The affidavits of defendants Hickey, Riley, Ristine, Gundling and Marcus (copies of which are annexed hereto as Exhibits G, H, I, J and K, respectively) show that these defendants are neither residents nor domiciliaries of the State of New York. Although I have been unable to contact former trustee E. G. Denys in order to obtain an affidavit from him, the Plan's records reveal that Mr. Denys is a resident and domiciliary of Louisiana. (There should be no dispute that Mr. Denys does not reside in New York State since plaintiff has alleged that all defendants are not residents of the State of New York. Complaint, paragraph THIRD).

17. Moreover, neither I nor any of the named defendants have been served with a copy of the summons and complaint (see Exhibits E-K hereto). The "U.S. Marshals Service Process Receipt and Return" filed herein (a copy of which is annexed hereto as Exhibit L) shows that the only person upon whom service of process was made was a Ned Phillips, Esq. Mr. Phillips is a member of the law firm of Abraham E. Freedman and neither he nor his firm have ever

been designated or authorized to accept service of process upon any of the defendants, except in their official capacities as trustees (or Administrator) of the Plan. (See affidavit of Ned Phillips annexed hereto as Exhibit M.)

18. Plaintiff alleges no basis for this Court's exercise of jurisdiction over the person of defendants who are neither residents nor domiciliaries of the State of New York. Thus, I am advised by counsel that service of the summons and complaint herein on Mr. Phillips does not confer upon this Court personal jurisdiction over the two non-resident defendants who are no longer trustees of the Plan (Marcus and Denys). I am further advised by counsel that, since the Freedman firm has been designated as an agent for service of process on the trustees and the administrator of the Plan only in their official capacities, service of the summons and complaint on Mr. Phillips does not confer upon this Court personal jurisdiction over defendants Franco, Hickey, Riley, Ristine and Gundling in their individual capacities.

19. Therefore, I respectfully request that the Court grant defendants' motion for an order dismissing the complaint on the grounds that: the Court lacks subject matter jurisdiction over the claims set forth in the complaint; the Court lacks personal jurisdiction over defendants Marcus and Denys; the Court lacks personal jurisdiction over defendants Hickey, Riley, Ristine and Gundling in their individual capacities; service of process was insufficient to confer upon this Court jurisdiction over defendants Marcus and Denys; and service of process was insufficient to confer upon this Court jurisdiction over defendants Franco, Hickey, Riley, Ristine and Gundling in their individual capacities.

ALBERT FRANCO

Sworn to before me this

23rd day of December, 1975

Warren John Tolin

NOTARY PUBLIC

WARREN JOHN TOLIN
NOTARY PUBLIC, State of New York
No. 2-051117
Qualified in the County of
Commission Expires March 31, 1976

29
AGREEMENT DATED DECEMBER 22, 1972

AGREEMENT made this 22nd day of December, 1972 by and between the **NEU PENSION & WELFARE PLAN**, an unincorporated association, (hereinafter the "Plan"), having its principal office at 36 Seventh Avenue, New York, N.Y. 10011 and **PRESCRIPTION PLAN SERVICE CORPORATION**, a New York corporation, (hereinafter "PPS"), having its principal place of business at 126 University Place, New York, N.Y. 10003.

W I T N E S S E T H:

WHEREAS, the Plan is established for the purpose of providing health and welfare benefits to covered Plan members and their dependents; and

WHEREAS, the Plan desires to cover such members with a comprehensive self-insured drug program; and

WHEREAS, PPS manages and administers drug programs; and

WHEREAS, PPS has agreements with pharmacies in various cities in the United States pursuant to which such pharmacies participate in the drug programs managed and administered by PPS.

NOW, THEREFORE, the parties hereto agree as follows:

1. PPS shall manage and administer on behalf of the Plan a drug program which has been established by the Plan for the benefit of the Plan's eligible members.

2. The Plan shall be responsible for the determination and re-determination of the eligibility of its members and their dependents for coverage under the drug program. The initial determination shall be made as of the effective date of the drug program and a list of eligible members furnished to PPS. The Plan shall redetermine such eligibility as of July 1, 1973 and every six months thereafter and shall furnish a list of eligible members to PPS after the commencement of each six month period. The initial list shall also include the names of eligible pensioners receiving a pension from the Plan but the eligibility of such pensioners shall only be redetermined as of the third anniversary date of the effective date of the drug program. Deletions and additions to such list of pensioners shall be furnished from time to time at the discretion of the Plan.

3. PPS shall be responsible for the issuance of an identification card to each eligible Plan member or pensioner on the lists furnished by the Plan. The identification cards shall be valid for a period of six months in the case of members and for a period of three years in the case of pensioners. The presentation of the identification card by a member or pensioner shall authorize a participating pharmacy to fill prescriptions within the scope of the PMU Pension & Welfare Plan drug program as set forth in Exhibit I during the period of validity of the identification card. PPS shall be responsible for verifying the

eligibility of persons using identification cards in accordance with the lists furnished by the Plan and shall notify the Plan in the event any claims are filed under the drug program by persons ineligible for participation in the drug program.

4. Drugs covered by this program must be prescribed by a licensed Medical Doctor, Dentist, Osteopathic Physician or Podiatrist. No prescription shall be covered by the drug program established hereunder unless it is filled or refilled within six months after the date originally prescribed.

5. For each prescription filled by a participating pharmacy which comes within the category of drugs recognized under the program, PPS shall pay the pharmacy the prescription cost determined by the "Red Book" or such other price authority as shall be agreed to in writing by PPS and the Plan, plus a professional fee of \$1.80 and less a \$2.00 deductible charge payable by the Plan member directly to the pharmacy. In the event the prescription cost as determined by the "Red Book" or the other price authority is less than \$2.00 the entire cost of such prescription shall be paid by the Plan member and there shall be no charge to the Plan pursuant to paragraph 6 below for such prescription, except for those items processed or rejected by PPS.

6. During the first and third week of each month after the effective date of the drug program, PPS shall submit to the Plan a statement of charges for prescriptions (computed as provided in paragraph 5 above) processed during such two-week period, together with a copy of each prescription form constituting the basis upon which the statement of charges was computed. Upon receipt and acceptance of such charges, the Plan shall remit to PPS the total of such charges plus thirty-eight cents (\$.38) for each claim processed or rejected during such period. PPS warrants and agrees that it will pay the participating pharmacies the sums to which they are entitled not later than 20 days after receipt of such funds from the Plan.

7. An annual enrollment fee of fifty cents (\$.50) per eligible member shall be paid by the Plan on the effective date of the drug program and on the commencement of each calendar year thereafter for the duration of this Agreement. An enrollment fee of forty cents (\$.40) will be paid by the Plan for additional eligible members added during the ten month period commencing on the effective date of the drug program and during each subsequent calendar year thereafter. The parties acknowledge that these fees are to cover the costs of all mailings and all other charges pertinent to the mailing.

8. PPS shall be responsible for processing all claims to verify that the filled prescriptions are those items that are within

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the scope of the program created by this Agreement and shall additionally be responsible for verifying the price computation of each prescription.

9. PPS represents and warrants that the list of pharmacies annexed hereto as Schedule A are pharmacies participating, pursuant to written agreements with PPS, in other drug programs managed and administered by PPS and that all such pharmacies will participate in the drug program being established by this Agreement. Within 20 days after the addition of a new pharmacy to such list or the deletion of a participating pharmacy from such list, PPS will give written notice of such addition or deletion to the Plan. PPS agrees to use its best efforts to enter into agreements with pharmacies in localities where there now are or will be eligible Plan members and their dependents or pensioners but no current participating pharmacies. PPS represents and warrants that they have contracts with at least the number of pharmacies located in the cities set forth below:

<u>CITY</u>	<u>NO. PHARMACIES</u>
New York	3,000
Houston & Galveston	100
New Orleans	35
Miami & Tampa	50
San Francisco	50
Philadelphia	100
Boston	70
Baltimore	70
Norfolk	13
Mobile	19
Seattle	38
Providence	15
Savannah	8
San Pedro	4

10. PPS represents and warrants that the current professional fee being paid by PPS to participating pharmacies is \$1.80. PPS will

not make any modification or revision in such professional fee without the prior written consent of the Plan which consent shall not unreasonably be withheld.

11. PPS shall design and have prepared at its own expense all forms, including prescription blanks, identification cards and associated information or literature to be distributed to Plan members and shall supply a reasonable number of such forms as the Plan shall have requested in writing to the Plan without charge.

12. At all times during normal business hours, the Plan shall have the right to inspect all PPS vouchers and records covering payments made by PPS to participating pharmacies on behalf of the Plan pursuant to this Agreement. If such inspection by the Plan discloses errors in invoicing or payments, such errors shall be corrected (either by repayment by PPS to the Plan of excess amounts paid by the Plan or by payment by the Plan to PPS of any amounts due to PPS) within 30 days after written notice is given by the Plan to PPS of such error. Any inspections made by the Plan pursuant to this paragraph shall be at the Plan's expense.

13. This Agreement shall remain in full force and effect for a period of one year from March 1, 1973 and will automatically be extended on the first anniversary date, provided, however, that either party to this Agreement may terminate the Agreement at any time after

the first anniversary date, such termination to be effective 60 days after the giving of written notice to either party. The termination of this Agreement shall not effect the continuing obligations of either party with respect to claims incurred for prescription drug benefits by eligible ^{members} during the term of this Agreement.

14. All notices hereunder shall be in writing and shall be deemed to have been duly given if delivered or mailed, first class, postage prepaid, registered or certified mail return receipt requested to the parties at their addresses set forth at the beginning of the Agreement or at such other address as the party may have by similar notice specified.

15. This Agreement is being executed and delivered and is being performed in the State of New York and shall be considered and enforced in accordance with the laws of such State.

16. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof and can be changed only by a writing executed by both of the parties.

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IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

NMU PENSION & WELFARE PLAN

M. F. Hickey

By M. F. Hickey
Employer Trustee

Shannon J. Wall

By Shannon J. Wall
Union Trustee

PRESCRIPTION PLAN SERVICE CORPORATION

Bernard J. Malzo

By Bernard J. Malzo
(President)

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AGREEMENT OF JANUARY 29, 1974

AGREEMENT made this ~~29th~~ day of January, 1974 by and between the RMU PENSION & WELFARE PLAN, an unincorporated association, (hereinafter the "Plan"), having its principal office at 346 West 17th Street, New York, N.Y. 10011, and PRESCRIPTION PLAN SERVICE CORPORATION, a New York corporation, (hereinafter "PPS"), having its principal place of business at 233 West 49th Street, New York, ~~N.Y.~~ N.Y. 10019.

W I T N E S S E T H:

WHEREAS, the Plan is established for the purpose of providing health and welfare benefits to covered Plan members and their dependants; and

WHEREAS, the Plan desires to cover such members with a comprehensive and self-insured drug program; and

WHEREAS, PPS manages and administers drug programs; and

WHEREAS, PPS has agreements with pharmacies in various cities in the United States pursuant to which such pharmacies participate in the drug programs managed and administered by PPS.

NOW, THEREFORE, the parties hereto agree as follows:

1. PPS shall manage and administer on behalf of the Plan a drug program which has been established by the Plan for the benefit of the Plan's eligible members.

2. The Plan shall be responsible for the determination and redetermination of the eligibility of its members and their dependants for coverage under the drug program. The Plan shall redetermine such eligibility as of July 1, 1973 and every six months thereafter and shall furnish a list of eligible members to PPS after the commencement of each six month period. The initial list shall also include the names of eligible pensioners receiving a pension from the Plan but the eligibility of such pensioners shall only be redetermined as of the third anniversary date of the effective date of the drug program. Deletions and additions to such list of pensioners shall be furnished from time to time at the discretion of the Plan.

3. PPS shall be responsible for the issuance of an identification card to each eligible Plan member or pensioner on the lists furnished by the Plan. The identification cards shall be valid for a period of six months in the case of members and for a period of three years in the case of pensioners. The presentation of the identification card by a member or pensioner shall authorize a participating

pharmacy to fill prescriptions within the scope of the NMU Pension & Welfare Plan drug program as set forth in Exhibit I during the period of validity of the identification card. PPS shall be responsible for verifying the eligibility of persons using identification cards in accordance with the lists furnished by the Plan and shall notify the Plan in the event any claims are filed under the drug program by persons ineligible for participation in the drug program.

4. Drugs covered by this program must be prescribed by a licensed Medical Doctor, Dentist, Osteopathic Physician or Podiatrist. No prescription shall be covered by the drug program established hereunder unless it is filled or refilled within six months after the date originally prescribed.

5. For each prescription filled by a participating pharmacy which comes within the category of drugs recognized under the program, PPS shall pay the pharmacy the prescription cost determined by the "Red Book" or such other price authority as shall be agreed to in writing by PPS and the Plan, plus a professional fee of \$2.00 except for pharmacies in the State of California, wherein the professional fee shall be \$2.40 and less a \$2.00 deductible charge payable by the Plan member directly to the pharmacy. In the event the prescription cost as determined by the "Red Book" or other price authority is less than \$2.00 the entire cost of such

prescription shall be paid by the Plan member and there shall be no charge to the Plan pursuant to paragraph 6 below for such prescription except for those items processed or rejected by PPS.

6. During the first and third week of each month after the effective date of the drug program, PPS shall submit to the Plan a statement of charges for prescriptions (computed as provided in paragraph 5 above) processed during each two week period, together with a copy of each prescription form constituting the basis upon which the statement of charges was computed. Upon receipt and acceptance of such charges, the Plan shall remit to PPS the total of such charges plus fifty cents (\$.50) for each claim processed or rejected during such period. PPS warrants and agrees that it will pay the participating pharmacies the sums to which they are entitled not later than 20 days after receipt of such funds from the Plan.

7. An annual enrollment fee of fifty cents (\$.50) per eligible member shall be paid by the Plan on the effective date of the drug program and on the commencement of each calendar year thereafter for the duration of this Agreement. An enrollment fee of forty cents (\$.40) will be paid by the Plan for additional eligible members added during 1974 and during each subsequent calendar year thereafter. The parties acknowledge that these fees are to cover

the costs of all mailings and all other charges pertinent to the mailing.

8. PPS shall be responsible for processing all claims to verify that the filled prescriptions are those items that are within the scope of the program provided by this Agreement and shall additionally be responsible for verifying the price computation of each prescription.

9. PPS represents and warrants that the list of pharmacies annexed hereto as Schedule A are pharmacies participating, pursuant to written agreements with PPS, in other drug programs managed and administered by PPS and that all such pharmacies will participate in the drug program being established by this Agreement. Within 30 days after the addition of a new pharmacy to such list or the deletion of a participating pharmacy from such list, PPS will give written notice of such addition or deletion to the Plan. PPS agrees to use its best efforts to enter into agreements with pharmacies in localities where there now are or will be eligible Plan members and their dependants or pensioners but no current participating pharmacies. PPS represents and warrants that they have contracts with at least the number of pharmacies located in the cities set forth below:

<u>CITY</u>	<u>NO. PHARMACIES</u>
New York	3,000
Houston & Galveston	100
New Orleans	35
Miami & Tampa	50
San Francisco	50
Philadelphia	100
Boston	70
Baltimore	70
Norfolk	13
Mobile	19
Seattle	38
Providence	15
Savannah	8
San Pedro	4

10. PPS represents and warrants that the current professional fee being paid by PPS to participating pharmacies is \$2.00 except for pharmacies in the State of California, wherein the professional fee is \$2.40. PPS will not make any modification or revision in such professional fee without the prior written consent of the Plan which consent shall not unreasonably be withheld.

11. PPS shall design and have prepared at its own expense all forms, including prescription blanks, identification cards and associated information or literature to be distributed to Plan members and shall supply a reasonable number of such forms as the Plan shall have requested in writing to the Plan without charge.

12. At all times during normal business hours, the Plan shall have the right to inspect all PPS vouchers and records covering payments made by PPS to participating pharmacies on behalf of the Plan pursuant to this Agreement. If such inspection by the Plan discloses errors in invoicing or payments, such errors shall be corrected (either by repayment by PPS to the Plan of excess amounts paid by the Plan or by payment by the Plan to PPS of any amounts due to PPS) within 30 days after

... written notice is given by the Plan to PPS of such error. Any inspections made by the Plan pursuant to this paragraph shall be at the Plan's expense.

13. This Agreement shall remain in full force and effect for a period of one year from January 1, 1974 and will automatically be extended on the first anniversary date, provided, however, that either party to this Agreement may terminate the Agreement at any time after the first anniversary date, such termination to be effective 60 days after the giving of written notice to either party. The termination of this Agreement shall not effect the continuing obligations of either party with respect to claims incurred for prescription drug benefits by eligible members during the term of this agreement.

14. All notices hereunder shall be in writing and shall be deemed to have been duly given if delivered or mailed, first class, postage prepaid, registered or certified mail return receipt requested to the parties at their addresses set forth at the beginning of the Agreement or at such other addresses as the party may have by similar notice specified.

15. This Agreement is being executed and delivered and is being performed in the State of New York and shall be considered and enforced in accordance with the laws of such State.

16. This Agreement constitutes the entire agreement between the parties pertaining to the subject matter hereof and can be changed only by a writing executed by both of the parties.

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

M.F. HICKEY

NMU PENSION & WELFARE PLAN

By

M. F. Hickey
Employer Trustee

MEL BARISIC

By

Mel Barisic
Union Trustee

PRESCRIPTION PLAN SERVICE CORPORATION

BERNARD J. MALZU

Bernard J. Malzu
(President)

AGREEMENT OF JANUARY 11, 1975

AGREEMENT made this 11th day of January, 1975 by and between the NEW PENSION & WELFARE PLAN, an unincorporated association, (hereinafter the "Plan"), having its principal office at 346 West 17th Street, New York, New York 10011, and PRESCRIPTION PLAN SERVICE CORPORATION, a New York corporation, (hereinafter "PPS"), having its principal place of business at 233 West 29th Street, New York, New York 10019.

W I T N E S S E T H:

WHEREAS, the Plan is established for the purpose of providing health and welfare benefits to covered Plan members and their dependants; and

WHEREAS, the Plan desires to cover such members with a comprehensive and self-insured drug program; and

WHEREAS, PPS and the Plan entered into an Agreement dated the 29th day of January, 1974 for the furnishing of such a drug program and now desire to extend that Agreement for a period of six months from January 1, 1975 through June 30, 1975 subject to certain changes as more particularly set forth herein.

NOW, THEREFORE, the parties hereto agree as follows:

1. The Agreement between the parties dated January 29, 1974 is hereby extended for a period of six months from January 1, 1975 to June 30, 1975 with the following changes.
2. Paragraph 6 of the Agreement dated January 29, 1974 is amended to add the following sentence:

"If during any six month period that this Agreement is in effect the amount payable to PPS for processing claims as set forth herein shall be less than the amount computed by multiplying the number of eligible members enrolled in the Plan at the commencement of such six month period by \$1.50, then PPS shall be paid the amount so computed as its fee for processing all claims during said period."
3. Paragraph 7 of the Agreement dated January 29, 1974 is deleted in its entirety and the following paragraph substituted therefore:

"7. A semi-annual enrollment fee of twenty-five cents (\$.25) per eligible member shall be paid to PPS by the Plan as of January 1 or July 1 of any six month period that this Agreement is in effect. An enrollment fee of twenty-five cents (\$.25) shall be paid to PPS by the Plan for each additional eligible member added during any six month period that this Agreement is in effect. The parties acknowledge that these fees are to cover the costs of all mailings and all other charges pertinent to the mailings."
4. Paragraph 13 of the Agreement dated January 29, 1974 is hereby amended to read as follows:

"13. This Agreement shall be renewable for an additional six month period by written notice from the Plan to PPS not less than 60 days prior to June 30, 1975."

5. The Agreement dated January 29, 1974 is hereby amended by the addition of Paragraph 17 as follows:

"17. (a) Either party to this Agreement may terminate said Agreement at any time, said termination to take effect 60 days after the giving of written notice of such intention to terminate this Agreement by either party to the other. The termination of this Agreement shall not effect the continuing obligations of either party with respect to claims incurred by prescriptions for eligible members during the term of this Agreement.

(b) Upon termination of this Agreement, as amended, in the event that PHS continues to receive prescription billings from participants in the Plan and participating druggists, payment for any prescriptions filled after the termination date of this Agreement will be at the rate of \$1.00 service fee per claim."

IN WITNESS WHEREOF, the parties hereto have executed this Agreement the day and year first above written.

NMU PENSION & WELFARE PLAN

M. F. HICKEY

By

M. F. Hickey
Employer Trustee

MEL BARISIC

By

Mel Barisic
Union Trustee

PRESCRIPTION PLAN SERVICE CORPORATION

BERNARD J. MALZIO

By

B. J. Malzio
President

AFFIDAVIT OF MEL BARISIC OF DECEMBER 3, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

: 75 Civ. 5262 (CLS)

- against -

:

ALBERT FRANCO, individually and as
Administrator, SHANNON J. WALL, :

AFFIDAVIT

MARTIN F. HICKEY, MEL BARISIC, F.K. :

RILEY, Jr., RICK MILLER, E. MARCUS, :

JAMES J. MARTIN, W. I. RISTINE, :

PETER BOCKER, E. G. DENYS, ANDREW :

RICH and KENNETH W. GUNDLING, :

individually and as Trustees of the :

NMU PENSION & WELFARE PLAN, :

Defendants.

-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

MEL BARISIC, being duly sworn, deposes and says:

1. I am and since November 10, 1954 have been
a Trustee of the NMU Pension & Welfare Plan, and I have
been named as a defendant in the above-captioned lawsuit.

2. I am a citizen of the State of New York and I
reside at 33-25 92nd Street, Jackson Heights, New York.

3. I have never been served with a copy of the
Summons or Complaint herein.

Michael J. L...

Sworn to before me this

3rd day of December, 1975

Walter H. T...

WALTER H. TOLIN
NOTARY PUBLIC, State of New York
No. 121,121/77
Queens County
Commission Expires December 31, 1976

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AFFIDAVIT OF RICK S. MILLER OF DECEMBER 16, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION,

Plaintiff,

- against -

75 Civ. 5262 (CBS)

ALBERT FRANCO, individually and as
Administrator, SHANNON J. WALL,
MARTIN F. HICKEY, MEL BARISIC, F.K.
RILEY, Jr., RICK MILLER, E. MARCUS,
JAMES J. MARTIN, W. I. RISTINE,
PETER BOCKER, E.G. DENYS, ANDREW
RICH and KENNETH W. GUNDELING,
individually and as Trustees of the
NMU PENSION & WELFARE PLAN,

Defendants.

AFFIDAVIT

STATE OF NEW YORK)

: ss.:

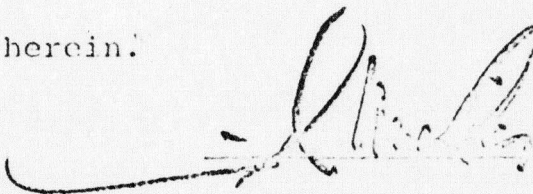
COUNTY OF NEW YORK)

RICK S. MILLER, being duly sworn, deposes and says:

1. I am and since August 27, 1958 have been a
Trustee of the NMU Pension & Welfare Plan, and I have been
named as a defendant in the above-captioned lawsuit.

2. I am a citizen of the State of New York and I reside at 233 Orienta Avenue, Mamaroneck, New York.

3. I have never been served with a copy of the Summons or Complaint herein.



Sworn to before me this

16th day of December, 1975



WARREN JOHN TOLAN
NOTARY PUBLIC, State of New York
No. 249247277
Qualified in Ulster County
Commission Expires March 30, 1976

AFFIDAVIT OF MARTIN F. HICKEY OF DECEMBER 9, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION :

Plaintiff, :

- against -

: 75 Civil 5262 (CBS)

ALBERT FRANCO, individually and as :
Administrator, SHANNON J. WALL, MARTIN :
F. HICKEY, MEL BARISIC, F. K. RILEY, :
Jr., RICK MILLER, E. MARCUS, JAMES J. :
MARTIN, W. I. RISTINE, PETER BOCKER, :
E. G. DENYS, ANDREW RICH and KENNETH :
W. GUNDLING, individually and as :
Trustees of the NMU PENSION & WELFARE :
PLAN, :

AFFIDAVIT

Defendants. :

-----X

STATE OF NEW YORK)

: ss.:

COUNTY OF NEW YORK)

MARTIN F. HICKEY, being duly sworn, deposes and
says:

1. I am and since March 25, 1966 have been a
Trustee of the NMU Pension & Welfare Plan and I have been
named as a defendant in the above-captioned lawsuit.

2. I am a citizen of the State of New Jersey and I reside at 19 Winter Place, Matawan, New Jersey.

3. I do not maintain any residence or domicile in the State of New York.

4. I have never been served with a copy of the Summons or Complaint herein.

Martin L. Hickey

Sworn to before me this

9th day of December, 1975.

William J. Felin

WILLIAM J. FELIN
NOTARY PUBLIC, State of New York
No. 2756277
Qualified January 1, 1974
Commission Expires January 1, 1976

AFFIDAVIT OF FRANKLIN K. RILEY OF DECEMBER 3, 197.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

- against - : 75 Civil 5262 (CMS)

ALBERT FRANCO, individually and as : AFFIDAVIT
Administrator, SHANNON J. WALL, MARTIN :
F. HJCKEY, MEL BARISIC, F. K. RILEY, :
Jr., RICK MILLER, E. MARCUS, JAMES J. :
MARTIN, W.I. RISTINE, PETER BOCKER, :
E. G. DENYS, ANDREW RICH and KENNETH :
W. GUNDLING, individually and as :
Trustees of the NMU PENSION & WELFARE :
PLAN, :

Defendants. :

-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

FRANKLIN K. RILEY, being duly sworn, deposes and
says:

1. I am and since June 19, 1970 have been a Trustee
of the NMU Pension & Welfare Plan and I have been named as a
defendant in the above-captioned lawsuit.

2. I am a citizen of the State of New Jersey and I reside at 1 Appert Terrace, Mahwah, New Jersey.

3. I do not maintain any residence or domicile in the State of New York.

4. I have never been served with a copy of the Summons or Complaint herein.

[Handwritten signature]

Sworn to before me this

3 day of Dec., 1975

[Handwritten signature]

56
AFFIDAVIT OF WILLIAM I. RISTINE OF DECEMBER 9, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

- against - :

ALBERT FRANCO, individually and as :
Administrator, SHANNON J. WALL, MARTIN :
F. HICKEY, MEL BARISIC, F. K. RILEY, :
Jr., RICK MILLER, E. MARCUS, JAMES J. :
MARTIN, W. I. RISTINE, PETER BOCKER, :
E. G. DENYS, ANDREW RICH and KENNETH :
W. GUNDLING, individually and as :
Trustees of the NMU PENSION & WELFARE :
PLAN, :

Defendants. :

75 Civil 5262 (CES)

AFFIDAVIT

-----X
STATE OF ^{NEW YORK} ~~PENNSYLVANIA~~)
COUNTY OF ^{New York} ~~Pennsylvania~~)

ss.:

WILLIAM I. RISTINE, being duly sworn, deposes and
says:

1. I am and since February 6, 1967 have been
a Trustee of the NMU Pension & Welfare Plan and I have been
named as a defendant in the above-captioned lawsuit.

2. I am a citizen of the State of Pennsylvania and I reside at 5 Kathwood Lane, Wayne, Pennsylvania.

3. I do not maintain any residence or domicile in the State of New York.

4. I have never been served with a copy of the Summons or Complaint herein.

Sworn to before me this

9th day of December, 1975

Warren John Tobin

WARREN JOHN TOBIN
NOTARY PUBLIC, State of New York
No. 140,000,000
Queens County
Commission Expires March 20, 1976

AFFIDAVIT OF KENNETH W. GUNDLING OF DECEMBER 5, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

-against- :

75 Civil 5262 (CES)

ALBERT FRANCO, individually and as :
Administrator, SHANNON J. WALL, MARTIN :
F. HICKEY, MEL BARISIC, F. K. RILEY, :
Jr., RICK MILLER, E. MARCUS, JAMES J. :
MARTIN, W. I. RISTINE, PETER BOCKER, :
E. G. DENYS, ANDREW RICH and KENNETH :
W. GUNDLING, individually and as :
Trustees of the NMU PENSION AND WELFARE :
PLAN, :

AFFIDAVIT

Defendants. :

-----X

STATE OF NEW ^{JERSEY} ~~YORK~~)
COUNTY OF ^{BERGEN} ~~NEW YORK~~) : ss.:

KENNETH W. GUNDLING, being duly sworn, deposes and
says:

1. I am and since February 8, 1973 have been a
Trustee of the NMU Pension & Welfare Plan and I have been
named as a defendant in the above-captioned lawsuit.

2. I am a citizen of the State of New Jersey,
and I reside at 203 Louis Street, Hackensack, New Jersey.

3. I do not maintain any residence or domicile in
the State of New York.

4. I have never been served with a copy of the
Summons or Complaint herein.

Sworn to before me this 5th Kenneth W. Stenling
December day of December, 1975

Daniel A. Checki

45
DANIEL A. CHECKI
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires June 15 1979

AFFIDAVIT OF EDMOND MARCUS OF DECEMBER 16, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

- against - :

ALBERT FRANCO, individually and as :
Administrator, SHANNON J. WALL, MARTIN :
F. HICKEY, MEL BARISIC, F. K. RILEY, :
Jr., RICK MILLER, E. MARCUS, JAMES J. :
MARTIN, W. I. RISTINE, PETER BOCKER, :
E. G. DENYS, ANDREW RICH and KENNETH :
W. GUNDLING, individually and as :
Trustees of the NMU PENSION AND WELFARE :
PLAN, :

75 Civil 5262 (CES)

AFFIDAVIT

Defendants. :

-----X

PENNSYLVANIA
STATE OF ~~NEW JERSEY~~)

COUNTY OF ~~MONMOUTH~~) : ss.:

EDMOND MARCUS, being duly sworn, deposes and says:

1. From December 20, 1965 until October 1, 1974

I served as a Trustees of the NMU Pension & Welfare Plan and
I have been named as a defendant in the above-captioned
lawsuit.

2. I am a citizen of the State of New Jersey and I reside at 500 Cypress Lane, Cherry Hill, New Jersey.

3. I do not maintain any residence or domicile in the State of New York.

4. I have never been served with a copy of the Summons or Complaint herein.

Sworn to before me this

16th day of November, 1975

Eileen H. Conners

EILEEN H. CONNERS
Notary Public, State of New Jersey
My Commission Expires May 14, 1979

AFFIDAVIT OF NED R. PHILLIPS OF DECEMBER 18, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

-against- :

75 Civ. 5262 (CES)

ALBERT FRANCO, individually and as :

Administrator, SHANNON J. WALL, :

MARTIN F. HICKEY, MEL BARISIC, :

F.K. RILEY, JR., RICK MILLER, :

E. MARCUS, JAMES J. MARTIN, :

W.I. RISTINE, PETER BOCKER, :

E.G. DENYS, ANDREW RICH and :

KENNETH W. GUNDLING, individually :

and as Trustees of the NMU PENSION & :

WELFARE PLAN, :

Defendants. - :

-----X

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

NED R. PHILLIPS, being duly sworn, deposes and says:

1. I am a member of the firm of Abraham E. Freedman, counsel for defendants Wall, Barisic, Miller, Martin, Bocker and Rich in the within matter, and co-counsel for the NMU Pension & Welfare Plan.

2. The firm of Abraham E. Freedman has been designated by the Trustees of the NMU Pension & Welfare Plan as agent for

the service of process upon the Trustees and the Administrator of the Plan in their official capacities. At no time has our firm been designated by any of the Trustees of the Plan, the Administrator or any of the individual defendants in this case as their agent for service of process upon them in their individual capacities.

3. When I accepted service of the summons and complaint in this matter, it was for those named defendants who are currently either Trustees or the Administrator of the Plan in their official capacities as Trustee or Administrator, and not in their individual capacities. Indeed, I was only served with one copy of the summons and complaint and not with individual summons and complaint for each defendant in this case.

Ned R. Phillips

 NED R. PHILLIPS

Sworn to before me this
 18th day of December, 1975

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Blanca Rothman

 NOTARY PUBLIC

BLANCA ROTHMAN
 NOTARY PUBLIC, State of New York
 No. 241100000
 Cert. Filed in New York County
 Qualified in Kings County
 Term Expires March 30, 1977

MOTION OF UNION TRUSTEES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

-against-

: 75 Civ. 5265 (CES)

ALBERT FRANCO, individually and as Administrator, SHANNON J. WALL, :

MARTIN F. HICKEY, MEL BARISIC, : NOTICE OF MOTION

F. K. RILEY, JR., RICK MILLER, :

E. MARCUS, JAMES J. MARTIN, :

W. I. RISTINE, PETER BOCKER, :

E. G. DENYS, ANDREW RICH and :

KENNETH W. GUNDLING, individually :

and as Trustees of the NMU PENSION & WELFARE PLAN, :

Defendants. :

-----x

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of Stanley B. Gruber, sworn to the 23rd day of December, 1975, the undersigned will move this Court before the Honorable Charles E. Stewart, Jr., at the United States Courthouse, Foley Square on the 8th day of January, 1976, for an Order pursuant to Rule 12(b) of the Federal Rules of Civil Procedure dismissing the complaint on the grounds that the Court lacks jurisdiction over the subject matter of this action and insufficiency of service of process upon the defendants in their individual capacities, and for such other and further relief as to this Court seems just and proper.

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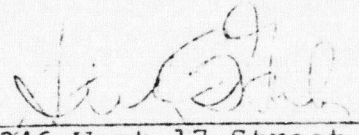
Yours etc.,

Dated: New York, New York
December 18, 1975

ABRAHAM E. FREEDMAN
Attorney for Defendants
WALL, BARISIC, MILLER,
MARTIN, BOCKER and RICH

STANLEY B. GALBER

By


346 West 17 Street
New York, New York 10011

TO: MILTON HOROWITZ, ESQ.
Attorney for Plaintiff
15 Park Row
New York, New York 10038

PROSKAUER, ROSE, GOETZ & MENDELSON
Attorneys for Defendants
FRANCO, HICKEY, RILEY, MARCUS,
RISTINE, DENYS and GUNDLING
300 Park Avenue
New York, New York 10022

AFFIDAVIT OF STANLEY B. GRUBER OF DECEMBER 23, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

PRESCRIPTION PLAN SERVICE CORPORATION,	:	
	:	
Plaintiff,	:	
	:	
-against-	:	75 Civ. 5265 (CES)
	:	
ALBERT FRANCO, individually and as	:	
Administrator, SHANNON J. WALL,	:	<u>AFFIDAVIT</u>
MARTIN F. HICKEY, MEL BARISIC,	:	
F. K. RILEY, JR., RICK MILLER,	:	
E. MARCUS, JAMES J. MARTIN,	:	
W. I. RISTINE, PETER BOCKER,	:	
E. G. DENYS, ANDREW RICH and	:	
KENNETH W. GUNDLING, individually	:	
and as Trustees of the NMU PENSION &	:	
WELFARE PLAN,	:	
	:	
Defendants.	:	


-----x

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

STANLEY B. GRUBER, being duly sworn, deposes and says:

1. I am a member of the firm of Abraham E. Freedman, counsel for defendants WALL, BARISIC, MILLER, MARTIN, BOCKER and RICH in the within matter. This affidavit is submitted in support of the motion of these defendants to dismiss this action for lack of jurisdiction over the subject matter and for insufficiency of service of process over defendants in their individual capacities.

2. A similar motion to dismiss has been filed by counsel for defendants FRANCO, HICKEY, RILEY, MARCUS, RISTINE, DENYS and GUNDLING in this matter. We expressly adopt and incorporate by reference the affidavits submitted by those defendants in support of their motion, including the affidavits of Albert Franco, Mel Barisic, Rick Miller, and Ned R. Phillips. Copies of those affidavits are annexed hereto.



STANLEY B. GRUBER

Sworn to before me this

day of December, 1975

NOTARY PUBLIC

PLAINTIFF'S NOTICE OF CROSS MOTION

S I R S :

PLEASE TAKE NOTICE that upon the annexed affirmation of MILTON HOROWITZ, dated January 29, 1976, and upon all the pleadings and proceedings heretofore had herein, the undersigned will, by cross motion, move this Court before the Honorable Charles E. Stewart, Jr., at the United States Courthouse, Foley Square, in the Borough of Manhattan, City, County and State of New York on the 5th day of February, 1976, for an Order granting leave to plaintiff to amend the caption of this action by dropping ALBERT FRANCO, MEL BARISIC and RICK MILLER as parties defendant herein, so that the caption of the action, as amended, will read as follows:

"UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

- against - :

SHANNON J. WALL, MARTIN F. HICKEY, :
F.K. RILEY, JR., EDMOND MARCUS, :
JAMES J. MARTIN, W.I. RISTINE, :
PETER BOCKER, E.G. DENYS, ANDREW :
RICH and KENNETH W. GUNDLING, indi- :
vidually and as Trustees of the :
NMU PENSION & WELFARE PLAN, :

Defendants." :

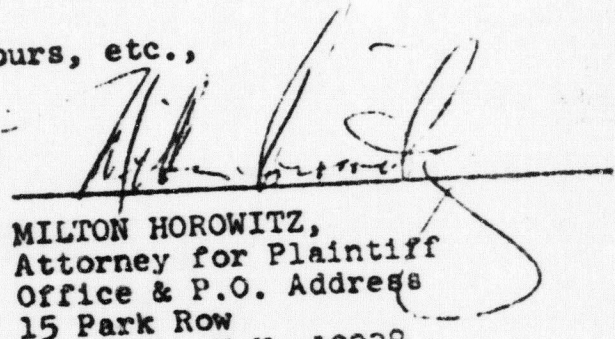
-----X

and for such other and further relief as to this Court may seem

just and proper.

Dated: New York, N.Y.
January 29, 1976.

Yours, etc.,


MILTON HOROWITZ,
Attorney for Plaintiff
Office & P.O. Address
15 Park Row
New York, N.Y. 10038
(212) Cortlandt 7-0606

TO: PROSKAUER, ROSE, GOETZ & MENDELSON, ESQS.
Attorneys for Defendants
FRANCO, HICKEY, RILEY, MARCUS,
RISTINE, DENYS and GUNDLING
300 Park Avenue
New York, N.Y. 10022
(212) 593-9000

ABRAHAM E. FREEDMAN, ESQ.,
Attorney for Defendants
WALL, BARISIC, MILLER,
MARTIN, BOCKER and RICH
346 West 17th Street
New York, N.Y. 10011
(212) 929-8410

AFFIRMATION OF MILTON HOROWITZ SUPPORTING PLAINTIFF

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, : 75 Civil 5262 CES

- against - :

ALBERT FRANCO, individually and as :
Administrator, SHANNON J. WALL, :
MARTIN F. HICKEY, MEL BARISIC, :
F.K. RILEY, JR., RICK MILLER, :
E. MARCUS, JAMES J. MARTIN, :
W.I. RISTINE, PETER BOCKER, :
E.G. DENYS, ANDREW RICH and :
KENNETH W. GUNDLING, individually :
and as Trustees of the NMU PENSION & :
WELFARE PLAN, :

AFFIRMATION

Defendants. :

----- X

MILTON HOROWITZ, an attorney at law duly admitted to practice in all of the courts of the State of New York and in this honorable Court, does hereby, under the penalties for perjury, certify and affirm as follows:

1. I am the attorney for the plaintiff herein and make this affirmation in support of plaintiff's cross motion to amend the caption of this action by dropping ALBERT FRANCO, MEL BARISIC and RICK MILLER as parties defendant herein; this affirmation is also made in opposition to the applications of the defendants for dismissal of the complaint for asserted lack of federal jurisdiction herein, and, secondarily, seeking to attach strings and conditions on the appearances herein of the defendants.

2. The glaring fact is that defendants' applications are premature since none of them have been served with the summons and complaint herein.

3. What happened is obvious from the U.S. Marshal's return herein, an accurate copy of which is annexed to the moving papers. I gave directions to the Marshal's office to serve the Plan Administrator - Albert Franco - at the Manhattan headquarters of the UMW WELFARE & PENSION PLAN. The deputy Marshal making the service was diverted by one Ned R. Phillips, Esq., an attorney member of the firm of Abraham E. Friedman, Esq., the attorney representing the Union appointed Trustees, and, I am advised, the Union (NMU) itself. Mr. Phillips, certainly without any consultation with me, prior or otherwise, induced the deputy Marshal to deliver the process to him rather than to defendant Franco, and the Marshal's return so reflects.

4. This was followed in due course by a stipulation extending defendants' time to answer or move with respect to the complaint, executed by Proskauer, Rose, Goetz & Mendelsohn, Esqs., as attorneys for the Administrator defendant Franco and the Employer appointed Trustee defendants, and by Abraham E. Freedman, Esq., as counsel for the Union appointed Trustee defendants.

5. After the second such stipulation, defendants brought the instant application, and while I would ordinarily not question the propriety of a threshold challenge to this Court's jurisdiction of the cause under 28 U.S.C. §§ 1331 and 1332, I confess sur-

prise at the defendants' effort to limit the scope of their appearance to a supposedly impersonal one (the Administrator excepted) of Trustees in their official capacity, but divorced from their personal responsibilities as individuals.

6. While this action does indeed sue the Trustees individually and in their respective capacities as Trustees, the rule - akin to that prevailing for partnerships in the scope and effect of service, but differing in the feature, peculiar to trusts, of liability for personal surcharge for abuse of the powers of a trustee - is that service on a trustee binds both the trust and the individual trustee who is served or who voluntarily appears in the action. For the trustee who has been served or who voluntarily appears, if adjudication calls for the imposition of a personal surcharge, the fact (if such it be) that he has been sued only as a trustee does not spare him from the imposition of the personal liability.

7. The defendants (the Administrator excepted since his liability can only be personal) can therefore not elect, as they seek here, to stand half in and half out of the action. If they are at liberty to disavow their appearances via the so-ordered stipulations and their positions as moving parties on this motion, then proper personal service returnable in this Court, scattered as the individual defendants may be, is not an insurmountable difficulty. The fact that the trust, the NMU PENSION & WELFARE

PLAN, is headquartered in Manhattan, makes each of the defendants amenable, wherever found, under New York's "long arm" statute, to the jurisdiction of this Court over their persons.

8. For reasons dealt with in my memorandum of law, plaintiff elects to regard service as not having been made on any of the defendants, and applies, by cross motion, to amend the caption of the action by dropping the following allegedly New York residents, FRANCO, BARISIC and MILLER, as parties defendant. The point of this amendment - the effect of which is the same as though the action had been brought without them - is, of course, to put the case solidly on a diversity jurisdictional basis even though plaintiff feels that this Court has federal question jurisdiction over the federal common law tort alleged in the first cause of action and pendent jurisdiction over the related contract cause of action alleged as the second cause in the complaint.

9. There can be no question of plaintiff's good faith in assuming that Albert Franco, Mel Barisic and Rick Miller were out-of-State, i.e., New Jersey residents. The annexed reverse side of the civil cover sheet, filed with the complaint, was checked against current New Jersey telephone directories and certainly seemed to confirm information given that they were indeed New Jersey domiciliaries. Were these three persons truly indispensable parties - and Franco who is not a trustee surely is not - their bald assertions of New York residency could not be accepted

as conclusive, and would have to be subject to further inquiry as to site of voter registration, etc. However, since they are not indispensable within the meaning of Rule 19 of the FRCP, in the sense that, assuming arguendo there is no federal question jurisdiction, their inclusion would oust the Court of its diversity jurisdiction, it is just as well to drop them now as parties defendant and thus put the jurisdiction of this Court over the cause beyond question. If the remaining defendants complain of loss of rights to contribution or indemnity, they can always bring them in as third party defendants under the diversity that exists between the remaining defendants and the alleged New Yorkers.

10. The hollowness of the "indispensible party" argument for the inclusion of all trustees is demonstrated by the fact that two of the Trustee defendants who have left office - Marcus and Denys - seek to be excluded from the action, even though they were in office while the alleged fraud was active and ongoing. On the other hand their replacements are not identified although mention is made of replacements having been made. If the replacements came in towards the end of the action, query whether they can or should be defendants. Patently as trustees leave and are replaced, there need be no changes of party defendant. Nor should a trust be given the power, contrary to the policy espoused by Rule 19 of the FRCP, to oust a District Court of its diversity jurisdiction of a case.

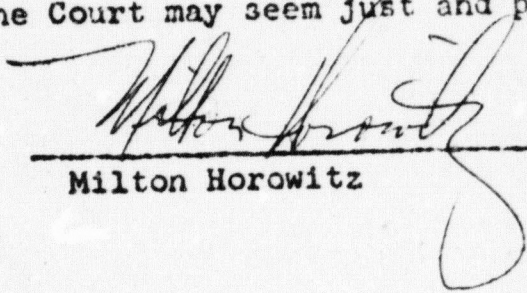
11. Our memorandum of law cites authority to show that the first and main cause of action pleads a federal common law tort, an action for fraud and deceit practiced upon the plaintiff to implement a gross diversion of trust resources from the legal Taft-Hartley trust objectives and purposes to the expressly illegal application, directly condemned by Taft-Hartley, of aggrandizing the patronage powers of a Union and its officers. The second cause of action, in contract, is plainly related and pendent to the first.

12. But even if, for whatever reason, it were to be held that the federal question jurisdiction of the cause were lacking here, the federal character and flavor of the litigation is so markedly obvious here, and this Court so well equipped in background and expertise to handle it, it would be unjust and undesirable to reject the diversity jurisdiction available here.

WHEREFORE, I respectfully request that plaintiff's cross motion be granted in all respects, that plaintiff be granted leave to amend the caption of this action to drop Albert Franco, Mel Marisic and Rick Miller as parties defendant, that defendants' motions to dismiss the complaint herein on jurisdictional grounds be denied in all respects, that the summons and complaint herein, amended as to caption aforesaid, be deemed as yet unserved, that no qualified appearance of any defendant named in the amended cap-

tion herein constitutes an appearance herein, and that plaintiff proceed in due course to effectuate service of the summons and complaint herein bearing said amended caption, together with such other and further relief as to the Court may seem just and proper.

Dated: New York, N.Y.
January 29, 1976.



Milton Horowitz

ADDRESS SIDE OF CIVIL COVER SHEET

PLAINTIFF(S) ADDRESS

PRESCRIPTION PLAN SERVICE CORPORATION
 233 West 10th Street
 New York, N.Y. 10011

DEFENDANT(S) ADDRESS

ALBERT FRANCO, 53 Briarcliff Road, Tenafly, N.J. - Bergen County
 SHANNON J. Wynn, 12 Stone Fence Road, Atlantic, N.J. - Bergen County
 MLL BARISIC, 802 Shetland Lane, Ridgewood, N.J. - Bergen County
 ... MILLER, JR., 1 Aspert Terrace, Mahwah, N.J. - Bergen County
 RICH MILLER, 72 Walraven Drive, Teaneck, N.J. - Bergen County
 E. MARCUS, c/o Gulf Oil Corp., P.O. Box 7290, Philadelphia, Pa. 19101
 James J. Martin, 30 Oak , Lodi, N.J. - Bergen County
 W.I. NISTINE, c/o Keystone Shipping Co., 313 Chestnut Street, Philadelphia, Pa.
 PETER BOCKER, 15 Chawick Place, Glen Rock, N.J. - Bergen County /19105
 E.G. DUNY, 712 Sena Drive, Metairie, Louisiana
 Andrew Rich, 175 Passaic Ave., Mahwah, N.J. - Bergen County
 KENNETH W. GRUNDLING, 33 West Central Ave., Maywood, N.J. - Bergen County

DEFENDANT(S) ADDRESS UNKNOWN

REPRESENTATION IS HEREBY MADE THAT, AT THIS TIME, I HAVE BEEN UNABLE, WITH REASONABLE DILIGENCE, TO ASCERTAIN THE RESIDENCE ADDRESSES OF THE FOLLOWING DEFENDANTS:

MARTIN F. RICKLEY, whose place of work is with T & M Service Corp. at 11 Broadway, New York, N.Y. 10004

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 SIGNATURE OF ATTORNEY OF RECORD

(60)

[R-10]

REPLY AFFIDAVIT OF NED R. PHILLIPS OF FEBRUARY 11, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, : 75 Civil 5262 CES

Plaintiff, :

-against- :

ALBERT FRANCO, individually and as :
Administrator, SHANNON J. WALL, :
MARTIN F. HICKEY, MEL BARISIC, F. K. :
RILEY, JR., RICK MILLER, E. MARCUS, :
JAMES J. MARTIN, W. I. RISTINE, :
PETER BOCKER, E. G. DENYS, ANDREW :
RICH and KENNETH W. GUNDLING, in- :
dividually and as Trustees of the :
NMU PENSION & WELFARE PLAN, :

AFFIDAVIT

Defendants. :

-----X

STATE OF NEW YORK)
) SS.
COUNTY OF NEW YORK)


NED R. PHILLIPS, being duly sworn, deposes and says:

1. I am an attorney associated with the firm of Abraham E. Freedman, counsel for defendants Wall, Barisic, Miller, Martin, Bocker and Rich in the within matter.

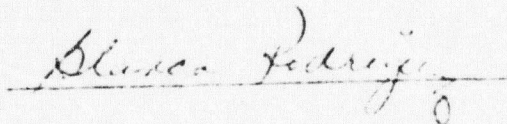
2. The Affirmation submitted by counsel for plaintiff in opposition to Defendants' Motion to Dismiss alleges that deponent "diverted" the Deputy Marshall making service in this matter and "induced" said Deputy Marshall to deliver service of process to deponent rather than to defendant Franco. This is not the case. The Deputy Marshall who effected service in this matter came to deponent's office and advised deponent that he had

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been referred to the office of Abraham E. Freedman by Mr. Franco's office. Since deponent's office has been authorized to accept service of process for the trustees of the NMU Pension & Welfare Plan in their capacities as trustees, deponent accepted service of process from the aforesaid Deputy Marshall. At no time did deponent advise the Deputy Marshall that he was authorized to accept service of process for defendant trustees and administrator in their individual capacities. At no time did deponent make any effort to "divert" or "induce" the Deputy Marshall from serving Mr. Franco. The Deputy Marshall came to my office on his own accord and without any inducement on my part. He advised me that he had been told that my office would accept service of process and I accepted such service for the defendants in their official capacities as trustees and administrator.


 NED R. PHILLIPS

Sworn to before me this
 11th day of February, 1976.


 0

NOTARY
 COMM. # 117
 J. A. 117

AFFIDAVIT OF EDWARD G. DENYS OF JANUARY 16, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

, - against -

: 75 Civil 5262 (CES)

ALBERT FRANCO, individually and as
Administrator, SHANNON J. WALL,
MARTIN F. HICKEY, MEL BARISIC, F.K.
RILEY, Jr., RICK MILLER, E. MARCUS,
JAMES J. MARTIN, W.I. RISTINE,
PETER BOCKER, E.G. DENYS, ANDREW RICH
and KENNETH W. GUNDLING, individually
and as Trustees of the NMU PENSION &
WELFARE PLAN,

AFFIDAVIT

Defendants.

STATE OF LOUISIANA)

: ss.:

COUNTY OF)

EDWARD G. DENYS, being duly sworn, deposes and says:

1. From March 3, 1971 until May 1, 1975

I served as a Trustee of the NMU Pension & Welfare Plan and
I have been named as a defendant in the above-captioned law-
suit.

2. I am a citizen of the State of Louisiana and I reside at 912 Sena Drive, Metairie, Louisiana.

3. I do not maintain any residence or domicile in the State of New York.

4. I have never been served with a copy of the Summons or Complaint herein.

Sworn to before me this

16 day of January, 1976.

Sean G. Burke
SEAN G. BURKE

NOTICE OF REASSIGNMENT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK-----
Prescription Film Service CorpAlbert Franks et al
-----75 Civ 5226 QLA
Docket NumberNOTICE OF
REASSIGNMENT

Pursuant to the memorandum of the Coordinating Clerk
the above entitled action is reassigned to the calendar of

JUDGE Gerard L. Goettel

All future documents submitted in this action are to
be presented in the Clerk's Office for filing and shall have the
assigned Judge's initials after the docket number.

Dated: 5/24/76

Raymond F. Burghardt, Clerk

By: Dorothy Dean
Deputy ClerkAttorneys of Recordcc: Milton Horovitz
15 Park Row NYC 10038

NOTICE OF APPEAL JUNE 17, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
PRESCRIPTION PLAN SERVICE CORPORATION, :

Plaintiff, :

- against -

: 75 Civ11 5262 (GLG)

ALBERT FRANCO, individually and as
Administrator, SHANNON J. WALL,
MARTIN F. HICKEY, MEL BARISIC,
F.K. RILEY, JR., RICK MILLER,
E. MARCUS, JAMES J. MARTIN,
W.I. RISTINE, PETER BOCKER, E.G.
DENYS, ANDREW RICH and KENNETH W.
GUNDLING, individually and as Trustees
of the NMU PENSION & WELFARE PLAN,

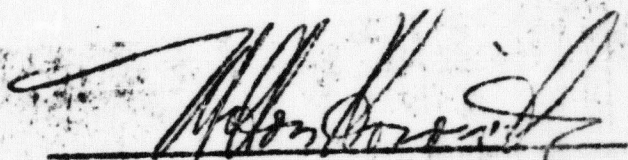
: PLAINTIFF'S NOTICE OF
: APPEAL

Defendants. :
-----X

S I R S :

NOTICE is hereby given that PRESCRIPTION PLAN SERVICE CORPORATION, plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the Order herein of HON. GERARD L. GOETTEL, dated June 15, 1976, granting defendants' motion to dismiss the complaint in its entirety for want of jurisdiction of the subject matter and denying plaintiff's cross motion to amend the caption of the action by dropping the allegedly resident defendants ALBERT FRANCO, MEL BARISIC and RICK MILLER as parties defendant in this action, and this appeal is taken from each and every part of said Order.

Dated : New York, N.Y.
June 17th, 1976


 MILTON HOROWITZ,
 Attorney for Plaintiff-Appellant
 Office & P.O. Address
 15 Park Row
 New York, N.Y. 10038
 (212) Cortlandt 7-0606

TO: PROSKAUER ROSE GOETZ & MENDELSON, ESQS.
 Attorneys for Defendants-Appellees Franco,
 Hickey, Riley, Marcus, Ristine, Denys & Gundling
 300 Park Avenue
 New York, N.Y. 10022
 (212) 593-9000

PHILLIPS & CAPPIELLO, ESQS.
 Attorneys for Defendants-Appellees Wall, Barisic
 Miller, Martin, Bocker and Rich
 346 West 17th Street
 New York, N.Y. 10011
 (212) 929-8410

TO: ABRAHAM E. FREEDMAN, ESQ.
 Former Attorney for Defendants Wall,
 Barisic, Miller, Martin, Bocker & Rich
 346 West 17th Street
 New York, N.Y. 10011
 (212) 929-8410

Clerk, United States District Court for
 the Southern District of New York

* * * * *

SAME TITLE

* * * * *

U.S. DISTRICT COURT
Jun 23 1976
S. D. OF N. Y.

JUDGMENT

Defendants having moved for an order to dismiss pursuant to Rule 12(b)(1)(2) and (5), of the Federal Rules of Civil Procedure, and the said motion having come on to be heard before the Honorable Gerard L. Goettel, United States District Judge, and the Court thereafter on June 16, 1976, having handed down its opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendants ALBERT FRANCO, individually and as Administrator, SHANNON J. WALL, MARTIN F. HICKEY, MEL BARISIC, F.K. RILEY, JR., RICK MILLER, E. MARCUS, JAMES J. MARTIN, W.I. RISTINE, PETER BOCKER, E. G. DENYS, ANDREW RICH and KENNETH W. GUNDLING, individually and as Trustees of the NMU PENSION & WELFARE PLAN, have judgment against plaintiff PRESCRIPTION PLAN SERVICE CORPORATION, dismissing the action.

Dated: New York, N.Y.
June 23, 1976

sgd/ Raymond F. Burghardt
Clerk

FR-187

OPINION

75 Civil 5262 (GLG)

OPINION NO. 44,573

GOETTEL, D. J.

The National Maritime Union has a Pension and Welfare Fund ("the Fund") established in accordance with the Labor-Management Relations Act of 1947. It is jointly administered by six trustee representatives of the Union and six trustee representatives of the employers. The Fund was established by a Declaration of Trust in 1950 which provided that it have its place of business in New York City and that it be governed by the laws of the State of New York.

Plaintiff is a New York corporation with its offices in New York. On December 22, 1972, it entered into an agreement with the Fund to administer and service a pharmaceutical prescription benefit program for the benefit of eligible beneficiaries of the Plan. That agreement was to last for one year, from March 1, 1973, to March 1, 1974. On January 29, 1974, a second agreement was entered into covering the calendar year 1974 (thereby terminating the first two months of the first contract), the terms of which differed only slightly from the preceding agreement.

[R-20]

On January 11, 1975, a third agreement was entered into, extending the previous agreement for an additional six months (until June 30, 1975), making certain changes from the prior agreement. The most pertinent changes had to do with a semi-annual enrollment fee for an eligible member, a guaranteed minimum service fee for processing claims, a provision that the agreement would expire on June 30, 1975, unless the Fund gave 60 days written notice that it wished to renew and that either party had the right to terminate the agreement at any time upon 60 days written notice. Finally, there was a provision covering billings received by the plaintiff following the termination of the agreement, providing for their fees during the run-out period.

The Fund did not give notice of renewal and, instead, around April of 1975, gave written notice that the agreement would be terminated as of June 30, 1975, since it found the plaintiff's performance to be unsatisfactory.

Plaintiff now sues contending that it had been fraudulently induced to enter into its contracts with the Fund, claiming that (specific language of the contracts

notwithstanding) it was led to believe that it could continue contractual relations indefinitely and, moreover, that the size and activity of the Fund had been misrepresented. Plaintiff maintains that there was a scheme among the various trustees and the administrator of the Fund to see that the pharmaceutical prescription program would not operate successfully. There is also a second cause of action concerning the provisions of the run-out agreement in which plaintiff contends that it was entitled to the guaranteed minimum monthly service fee regardless of the number of prescriptions filled during the post-contractual period.

Plaintiff has now sued the twelve persons who were trustees of the Fund at the time the second agreement was signed covering the year 1974. Two of these persons resigned as trustees before the termination of the relationship on June 30, 1975. Of the remaining ten trustees, eight are claimed to be citizens of states other than New York and two to be citizens of New York. In addition, the Administrator of the Fund has been sued and he claims to be a citizen of New York. The Fund, by its attorneys, was served with process,

but no service has been made on any of the individual defendants.

Defendants now move to dismiss the complaint on grounds that the court lacks jurisdiction over the subject matter and also lacks personal jurisdiction over various of the defendants for differing grounds, including insufficient service of process. In light of the conclusions reached concerning subject matter jurisdiction, it is unnecessary to consider the question of personal jurisdiction, which may be premature in any event since no service of process has been attempted upon the individuals.

Initially, plaintiff contends that there is subject matter jurisdiction under 28 U.S.C. §1331 in that its first claim arises under laws of the United States. The burden is on plaintiff to establish that the federal law under which the claim arises creates a duty or remedy cognizable in this action. Russo v. Kirby, 453 F.2d 548, 551 (2d Cir. 1971).

Plaintiff contends that the Labor-Management Relations Act (which was enacted to regulate relations

between labor and management), particularly Section 302 (29 U.S.C. §186) supports its claim, but plaintiff does not allege that there were any improper payments to union representatives or improper demands by them. The purpose of Section 302 of the Labor-Management Relations Act is to prevent corruption of the collective bargaining processes through bribery or extortion. Arroyo v. United States, 359 U.S. 419, 425-26 (1959); Schwartz v. Associated Musicians of Greater N.Y., Local 802, 340 F.2d 228, 233-34 (2d Cir. 1964).

Plaintiff does allege that the discontinuance of its contractual agreement with the Fund was part of an unspecified scheme to divert trust funds for improper purposes. Section 302, however, is not concerned with the fiduciary duties of trustees outside the labor management field. Bowers v. Ulpiano Casal, Inc., 393 F.2d 421, 424 (1st Cir. 1968); Moses v. Ammond, 162 F.Supp. 866 (S.D.N.Y. 1958). The plaintiff is an independent business, and even though it is coincidentally dealing with a union, it is not a part of that union relationship and thus lacks standing under Section 302. Carroll v. Associated Musicians of Greater New

York, 316 F.2d 574, 576 (2d Cir. 1963). See also Schwartz v. Associated Musicians of Greater N.Y., Local 802, supra. Finally, Section 302's remedies are limited to injunctive relief while the plaintiff here seeks money damages. The section affords no such remedy. Snider v. All State Administrators, Inc., 481 F.2d 387, 390 (5th Cir. 1973), cert. denied, 415 U.S. 957 (1974). See also Arroyo v. United States, supra at 427; Bowers v. Ulpiano Casal, Inc., supra; Morrissey v. Curran, 76 CCH Lab. Cas. 18370, 18373 (S.D.N.Y. 1975).

Plaintiff also attempts to premise federal subject matter jurisdiction on the Welfare & Pension Plan Disclosure Act, 29 U.S.C. §301 et seq. This act requires disclosure of certain required information to certain persons. The complaint contains no allegations whatever of any failure to disclose information and the reliance upon the statute is, therefore, misplaced. Moyer v. Kirkpatrick, 265 F.Supp. 348, 350 (E.D. Pa. 1967), aff'd, 387 F.2d 955 (3d Cir. 1968). Moreover, the plaintiff also lacks any standing under this section since it is not a participant or beneficiary of the

Fund. 29 U.S.C. §308(c); Golden v. Kentile Floors, Inc., 512 F.2d 838, 849-850 (5th Cir. 1975). Finally, and as with the Section 302 claim, the monetary remedy available (\$50 a day from the date of denial of information) is not that which the plaintiff seeks. Indeed, the primary thrust of 29 U.S.C. 308(g) is injunctive relief to restrain violations of the act.

Plaintiff does not contest its lack of involvement in these statutory schemes but claims, rather, that "the federal character and flavor of the litigation is so markedly obvious here, and this Court so well equipped in background and expertise to handle it, it would be unjust and undesirable to reject the diversity jurisdiction available here"

Plaintiff's counsel's affirmation, pp.4-5), and that the first cause of action is a "federal common law tort". Were the question of federal versus state jurisdiction a matter for discretion, this argument might have some force, but the basic requirement of federal jurisdiction is that it be premised on either constitutional or statutory grounds, both of which are lacking here. Wright and Miller, Federal Practice and Procedure, §1063.

Apparently recognizing the weakness of the 28 U.S.C. §1331 claim of an action arising under the laws of the United States, plaintiff has additionally claimed diversity jurisdiction. The allegation of diversity jurisdiction is simply limited to the statement that plaintiff is a New York citizen and it is suing "the defendants, who do not reside in the State of New York." (¶ Third (b) of the complaint.) This is an inadequate allegation of citizenship for diversity purposes. Lehigh Valley Industries, Inc. v. Birenbaum, 389 F.Supp. 788, 807 (S.D.N.Y. 1975); 1 Moore's Federal Practice §0.74 [3.-2.]. Moreover, the defendants have alleged and proved by affidavit that three of the individual defendants, and the Fund itself, are citizens of New York, thus destroying diversity jurisdiction.

The parties agree that the Fund is not a juridical entity, has no separate existence and, therefore, does not have citizenship for diversity purposes. It is acknowledged that, to sue the Fund, the plaintiff must sue the trustees. The question, therefore, is whether diversity jurisdiction may be maintained where two of the trustees are New York

citizens. (Defendants acknowledge that the Administrator of the Fund, a New York resident, is not a necessary party to the litigation.)

To avoid this problem, the plaintiff has cross-moved for an order dropping the three New York citizens as party defendants and amending the caption accordingly. In essence, this leaves the question of whether all of the trustees are indispensable parties and, if so, whether there can be diversity of citizenship where the plaintiff and some of the trustee defendants are citizens of the same state. (The question might also be viewed as being whether a trust is a citizen, for diversity purposes, of all states where its trustees are citizens, without regard to whether they are indispensable parties or not.) While there is surprisingly little authority in this area, what little there is would indicate an absence of federal diversity jurisdiction.

In Morrissey v. Curran, supra, it was held that all of the trustees of the NMU Pension & Welfare Fund were indispensable parties in an action brought by union members alleging trust violations:

"Since the employer trustees have a material legal interest in the fund which will be inevitably affected by any judgment rendered in this case, they are clearly indispensable parties under Rule 19(a), F. R. Civ. P. See Olson v. Miller, [36 LC ¶65,215] 263 F.2d 738 (D.C. Cir. 1959); Fitzgerald v. Jandreau, [26 LC ¶68,602] 16 F.R.D. 578 (S.D.N.Y. 1954). In their absence, moreover, complete relief cannot be afforded the parties; any order granting relief would have to be directed to all the trustees of the Deep Sea Fund, and the defendant trustees make up only one-half of the Board. Failure to join such indispensable parties would warrant dismissal of the proposed cause of action under Section 302 under Rule 12(b)(7), F. R. Civ. P...." Id. at 18374.

In another case, suit was brought by citizens of a state against a corporation of another state and the voting trustees of its stock. There, certain of the trustees were citizens of the same state as the plaintiffs and it was held that their personal residence defeated diversity jurisdiction and that they were indispensable parties. Kelley v. Queeney, 41 F.Supp. 1015 (W.D.N.Y. 1941).

It might be argued that the trustee occupies a purely representative position and that, therefore, his own

citizenship should be immaterial. Cf. Levering & Garrigues Co. v. Moorin, 61 F.2d 115, 121 (2d Cir. 1932), aff'd, 289 U.S. 103 (1933). Such an argument would not avail plaintiff. If the Fund's citizenship is looked to, there is an obvious lack of diversity since its principal place of business is in New York. Moreover, plaintiff argues that the trustees have an individual responsibility in their capacity as trustees and can be personally surcharged for an abuse of their powers. There is support for this view. Williston on Contracts, §312, Third Edition 1959. Finally, as the court noted in Kelley v. Queeney, *supra* at 1020:

"Regardless of how he sues, as representative or trustee or receiver, for the purpose of determining jurisdiction on the ground of diversity of citizenship, the actual individual citizenship of the party controls. The law is that citizenship of such a party is his actual individual citizenship. City of New Orleans v. Whitney, 138 U.S. 595, 606, 11 S.Ct. 428, 34 L.Ed. 1102; Trower v. Stonebraker-Zea Live Stock Co., D.C., 17 F.Supp. 687."

Admittedly, some difficult jurisdictional questions

could arise with a large union trust having trustees in each of the states of the Union. It might not seem reasonable, under some circumstances, to require joinder of all trustees and to nullify diversity jurisdiction because of the multiple citizenships. The only authority cited by the defendants concerning multiple trustees, Sanders v. Birthright, 172 F.Supp. 895 (S.D. Ind. 1959) is not in point. There, a plaintiff trust with its situs in Indiana, some of whose trustees were citizens of Indiana (and some not), sued an Indiana citizen. The court merely stated the obvious, at 897: "This is no diversity action and jurisdiction cannot be thus grounded for the court to base its power to grant the relief requested".

The problem seems relatively simple here. First of all, this is not a case in which a trustee is unavailable for service so that the action must proceed without him. Cf. Booth v. Security Mutual Life Insurance Company, 155 F. Supp. 755, 761 (D.N.J. 1957). Moreover, only does the Fund have its situs in the same state as the plaintiff, but one of the two trustees who signed the two agreements at issue, Mel Barisic, is a citizen of New York, residing in Jackson


Heights. Surely he is a necessary party to this litigation. Accordingly, there is no basis for diversity jurisdiction.

Finally, plaintiff urges that it be allowed to continue its action against the non-resident trustees individually as "fraud tortfeasors". There are several difficulties with such an approach, besides the fact that they have not been served with process.

For instance, the involvement, if any, of the defendants was in their representative capacities as trustees of the Fund and such involvement does not give rise to personal jurisdiction over the defendants as individuals. See Lehigh Valley Industries, Inc. v. Birenbaum, supra at 803-804. Moreover, the complaint is barren of any allegations whatever concerning actions of any individual defendant. The complaint, therefore, fails to comply with the requirements of Rule 9(b) Fed. R. Civ. P. of pleading fraud "with particularity". The motion to dismiss must be granted.

SO ORDERED:

Dated: New York, N.Y.,
June 15, 1976.


U.S. District Judge

HOROWITZ

STATE OF NEW YORK)
 : SS.
COUNTY OF RICHMOND)

ROBERT BAILEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N. Y. 10302. That on the 22 day of Sept. 1976 deponent served the within Joint Appendix upon

Proskauer Rose Goetz & Mendelsohn, Esqs. and
Abraham E. Freedman, Phillips & Cappiello, Esqs.

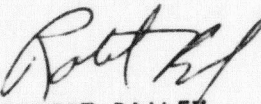
attorney(s) for

Defendants-Appellees

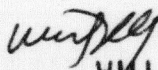
in this action, at

300 Park Avenue, New York, N.Y. 10022 and
346 West 17th St., New York, N.Y. 10011, respectively.

the address(es) designated by said attorney(s) for that purpose by depositing
1 copies of same enclosed in a postpaid properly addressed wrapper, in an
official depository under the exclusive care and custody of the United States
post office department within the State of New York.


ROBERT BAILEY

Sworn to before me, this 22 day
of Sept. , 1976



WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978

BEST COPY AVAILABLE